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Incest - Prosecution of the Case

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INCEST—PROSECUTION OF THE CASE

by Christine Lederer

While the physical abuse of children has been much discussed, the sexual abuse of children, and incest in particular, has, until recently, received very little attention. Broadly defined, incest refers to sexual activity between members of a family whose consanguinity would ordinarily preclude marriage. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1141 (1964).

The incest taboo prohibiting sexual relations between father and daughter, mother and son, brother and sister has existed in virtually all civilized cultures since ancient times. Yet, it has always been difficult to control the problem of incest as only a small percentage of incestuous activity is ever reported.

The crime of incest did not exist at common law in the United States. It evolved from religious or moral principles which societies determined to be sufficiently important to their preservation and to justify enactment of laws prohibiting such activity. 5 N. Kentucky L. Rev. 191 (1978). Consequently, statutory prohibition of incest was created at varying times in different states.

MD. CODE ANN. art. 27, §335 proscribes a person from knowingly having carnal knowledge of another person, who is within the degrees of consanguinity within which marriages are prohibited by the law in Maryland. The terms carnal knowledge and sexual intercourse are synonymous. CLARK AND MARSHALL, LAW OF CRIMES, 6th Ed. §11.01, 675. Sexual intercourse, and thus carnal knowledge, as defined by the court in *Robert v. State,* 220 Md. 159, 151 A.2d 737 (1954), means "actual contact of the sexual organs of a man and woman and an actual penetration into the body of the latter." The Court of Special Appeals in *Scott v. State,* 2 Md. App. 709, 237 A.2d 61 (1968), has assumed that penetration is also an essential element of incest within the meaning of the term carnal knowledge in article 27, §335. The court, however, specifically stated that emission is not an essential element to establish the crime of incest.

In order to prosecute the crime of incest, evidence must be presented to establish the following facts:

1) The defendant knowingly engaged in sexual intercourse, and,
2) The sexual union occurred with a person being within the degrees of consanguinity within which marriages are prohibited in Maryland.

In order to establish the first element of incest, the defendant must be proven guilty of the lesser included offense of carnal knowledge. Carnal knowledge by a male, of 18 years of age or over, of any female, not his wife, between the ages of 14 and 16 years is proscribed by MD. CODE ANN. art. 27, §464.

The second element requires evidence that the degree of consanguinity between the parties is such that marriage would be prohibited by law. MD. CODE ANN. art 27, §370 proscribed marriage between persons within three degrees of direct lineal consanguinity. In *Lusby v. State,* 217 Md. 191, 197, 141 A.2d 893 (1957), it was held that the prosecutix's testimony that the defendant was her father was sufficient proof of her pedigraic status. The Court, in reaching this conclusion, quoted from 31 C.J.S. *Evidence* §266(b): "It has been held

> proper, where the evidence is otherwise competent, for one to testify to facts of family history which relate to him, such as identity of his parents, or other relations . . . "

A common defense in sexual offense cases is that the prosecutrix was an accomplice rather than a victim. The Court in *Lusby v. State,* 217 Md. 191, 199, 141 A.2d 893 (1957) distinguished the situations wherein a participant in an incestuous relationship would be deemed an accomplice from those in which she would be considered a victim. The status of a participant is entirely a factual one. The key consideration being the free and willing consent to the sexual union by the woman makes her an accomplice. The court held that a passive participant is a victim rather than an accomplice. A passive participant in an incestuous relationship is defined as one who does not fully consent to copulation so that sexual union is achieved by force, threats or undue influence. In other words, the passive participant merely assents, as opposed to consents, to the aggressive participant's actions.

There is a material distinction between assent and actual consent, the latter meaning a voluntary agreement to do something proposed by another and requiring some positive action in addition to submission. Assent, on the other hand, means mere passivity or submission and does not include consent. *Lee v. State,* 18 Md. App. 719, 308 A.2d 397 (1973).

Once the court determines that the prosecutrix is a victim and not an accomplice, no corroborating evidence is required and the court is free to convict the accused on the victim's testimony alone. *Lee v. State, supra, see Sutton v. State,* 14 Md. App. 70, 72, A.2d (1967). *Tillery v. State,* 3 Md. App. 142, 148, A.2d (1967). In *Robert v. State,* 220 Md. 59, 151 A.2d 737 (1954), the Court held that the uncorroborated testimony of the prosecutrix-victim, if believed, was sufficient to sustain the conviction of the defendant on a charge of having carnal knowledge of a female child under the age of 14 years.

U.S. v. Bear Runner, 574 F.2d 966 (8th Cir. 1978), represents the first instance in which a federal court specifically rejects the corroboration requirement for an incest conviction in favor of the normal "beyond a reasonable doubt" standard. The defendant in this case was convicted of incest under both federal and South Dakota law. The evidence against him rested primarily on the uncorroborated testimony of the victim, his twelve year old daughter. On review, the United States Court of Appeals for the Eighth Circuit held that no corroboration of the complaining witness' testimony is required to establish guilt beyond a reasonable doubt in incest cases. In so ruling, the Eighth Circuit expressly rejected the position of *U.S. v. Ashe,* 138 U.S.App.D.C. 356, 427 F.2d 626 (D.C. Cir. 1970), wherein the Court held incest cases especially appropriate for the application of the corroboration rule as distortions, misrepresentations, and ordinary mistakes may occur more frequently among people who are forced to live together and deal with one another on a day-to-day basis.

Bear Runner follows the approach adopted by the Fourth Circuit in *U.S. v. Shipp,* 409 F.2d 33 (4th Cir.), cert. denied, 396 U.S. 864 (1969), in which the Court upheld defendant's conviction for having carnal knowledge of his stepdaughter. The Court stated that:

> "The triers of fact are to determine credibility, and if they accept her testimony, the jury may convict on it alone, if after considering any and all evidence to the contrary they believe beyond a reasonable doubt that the defendant committed the alleged crime . . . " *Id.* at 36.

Even though the Eighth Circuit cited *Shipp* as precedent for an incest case, the *Shipp* conviction was actually obtained on the ground that he had carnal knowledge of a female under 16 years of age. Therefore, the *Shipp* ruling that corroboration of the victim's testimony was not necessary for conviction did not apply specifically to incest cases until *Bear Runner.*

There has been little agreement as to what factors or general characteristics contribute to the incidence of incestuous activity. However, regardless of what factors are ultimately the cause of the incestuous act, there appears to be unanimous agreement that such occurrences cause deep and long-lasting psychological scars and have a very disruptive effect upon the familial structure and its members.

THE "RIGHT" TO ABORTION

by Nancy Kabara Dowling

Murphy's Law Book II defines a conclusion as "the place where you got tired of thinking."[1] Apparently the Supreme Court, Congress, and legislatures and courts around the world have not yet tired of thinking about the whole abortion issue: the West German Supreme Court has concluded that a fetus is a "person" protected by its Constitution.[2] Israel's Knesut has voted to restrict its liberal abortion laws.[3] Australia's Senate is now considering an anti-abortion bill passed by its House. Abortion was legalized in Canada in 1969, but today is a more divisive political issue than ever before. The United States House of Representatives Joint Resolution for a Constitutional Amendment that would extend protection to the unborn was sent to the Judiciary Committee in January. Commentators have described the Supreme Court's holding in *Harris v. McRae*[4] as going in precisely the opposite direction as *Roe v. Wade.*[5]

Roe, the 1973 landmark decision that struck down local anti-abortion laws, provided no real conclusion to the abortion controversy. Though hailed by many pro-abortionists as granting a right to abortion, what it did in fact create was the theory that the state's legitimate interest in protecting "potential" human life was to be weighed and balanced against the mother's right to "privacy" — at least during the first trimester.[6]

Roe has been attacked — even by such eminent pro-abortionists as Professor John Hart Ely of the Harvard Law School — on constitutional grounds. Ely described *Roe* as a "frightening" precedent and states that "[t]he problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question that the Constitution has not made the Court's business."[7]

> Ely notes problems with Constitutional interpretations:
> "The Court does not seem entirely certain about which provision protects the right to privacy and its included right to abortion . . . 'This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to terminate her pregnancy. *Wade* (93 S. Ct. at 727).' This inability to pigeonhole confidently the right involved is not important in and of itself. It might however, have alerted the Court to what is an important question: *Whether the Constitution speaks to the matter at all.* (emphasis added)".[8]

The Court in *Roe* announces that the right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy and then